

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION**

STATE OF TENNESSEE, *ex rel.*)
ROBERT E. COOPER, JR., ATTORNEY)
GENERAL and REPORTER,)

Plaintiff,)

v.)

BLUEHIPPO FUNDING, LLC, a Maryland)
corporation, BLUEHIPPO CAPITAL, LLC,)
VIRGINIA, a Virginia corporation,)
BLUEHIPPO CAPITAL LLC, NEVADA,)
a Nevada corporation, d/b/a BLUEHIPPO,)
DIGITAL BOULEVARD, www.bluehippo.com,)
www.bigbluead.com, and www.approvalpc.com,)

Defendants.)

No. 2:08-cv-2785

JURY DEMAND

**MEMORANDUM OF FACTS AND LAW
IN SUPPORT OF STATE’S MOTION TO REMAND**

The State seeks to remand this action because there is no basis for federal subject matter jurisdiction. The State is not a citizen for diversity purposes and is the real party-in-interest in its civil law enforcement action brought in the name of the State under the Tennessee Consumer Protection Act. The underlying purpose of the State’s action, which seeks wide-ranging injunctive, remedial, and other relief, when viewed as a whole, is not to vindicate the interests of select private parties, but to eliminate fraudulent and deceptive business practices in the marketplace in Tennessee. The TCPA itself, which the State advances through this action,

embodies the main bulwark of protection by which the State carries out its sovereign responsibilities to the people of Tennessee to safeguard the integrity of the marketplace.

Apart from these considerations, there is no basis for jurisdiction even if the Court were to accept the Defendants' arguments. While the State hotly disputes the contention that it is not the real party-in-interest, the Defendants' argument for diversity jurisdiction based solely on the State's restitution remedy nonetheless is fatally flawed. The Defendants cannot independently meet their amount-in-controversy burden because consumer restitution cannot be aggregated since the amounts sought do not involve a common or undivided interest and the aggregate amount for restitution is less than the \$5,000,000 class action threshold provided in 28 U.S.C. § 1332(d).

FACTS

1. On October 27, 2008, the Attorney General and Reporter of the State of Tennessee filed a civil law enforcement Complaint in the name of the State against the above-named Defendants in Shelby County Chancery Court for the Thirtieth Judicial District at Memphis. (Doc. No. 2, Attach. 1).

2. The Complaint generally alleged that the Defendants, who offer consumers computers and other electronics, falsely represented that select "free" merchandise would be sent with all orders; consistently failed to clearly and conspicuously disclose terms required by Tennessee's Prizes Offered as Inducements statute, Tenn. Code Ann. § 47-18-120; affirmatively misrepresented the consistency of contractual terms between verbal and written contracts; falsely represented that the Defendants' financing agreement was required; used deceptive sweeping terms in advertisements; failed to clearly and conspicuously disclose the Defendants' no refund,

extremely limited, or store-credit refund policy; misrepresented shipping dates to consumers; misrepresented the source of the products the Defendants' offer; deliberately and falsely represented that the Defendants' offer includes "no credit checks;" misrepresented the nature of the Defendants' guaranteed approval claim; failed to clearly and conspicuously disclose material conditions associated with approval; used a sweeping default provision that purportedly allows the Defendants to accelerate all amounts owed and raise the interest rate to the highest allowed by law or 24% APR for the smallest of technical violations; used unlawful choice of law and forum selection clauses; failed to disclose other material terms; actively misrepresented and failed to clearly and conspicuously disclose material terms of the Defendants' rebate program; established a customer service program that effectively deters consumer redress; debited consumer checking accounts counter to purported verbal and written agreements; misrepresented the Defendants' online security mechanism; implicitly or directly misrepresented the Defendants' licensure or registration status to make consumer loans; and engaged in other unfair or deceptive commercial practices. Doc. No. 1, Attach. 1, at paras. 7-13.

3. In the State's prayer for relief, the State seeks, among other things, a declaration that the Defendants have violated the Tennessee Consumer Protection Act, an extensive temporary and permanent injunction, civil penalties payable to the State under Tenn. Code Ann. § 47-18-108(b)(3) and Tenn. Code Ann. § 47-18-120(g), restitution, and attorneys' fees and costs for bringing its action. Doc. No. 1, Attach. 1, at 126.

4. At the same time the State filed its Complaint it also filed a motion for an extensive statutory temporary injunction and asset freeze to be used for restitution. The temporary injunction motion seeks to prohibit or require forty-three distinct acts. The State,

prior to the filing of removal, explicitly stated the purpose of its asset freeze as follows:

In order to preserve funds for consumer restitution and/or disgorgement of ill-gotten gains and in direct advancement of the State's police and regulatory power, civil law enforcement authority, and the purposes of the Tennessee Consumer Protection Act identified at Tenn. Code Ann. § 47-18-102, including allowing the State to provide for the protection of consumers and legitimate business enterprises from those who engage in unfair or deceptive acts or practices, the advancement of ethical standards of dealing between persons engaged in business, and the maintenance of the integrity of the marketplace in Tennessee as a whole, the State of Tennessee moves as follows . . .

Doc. No. 1, Attach. 5.

5. The motion for the temporary injunction hearing was originally set for November 19, 2008 in Shelby County Chancery Court. Doc. No. 1, Attach. 6. A notice of hearing on the temporary injunction motion listing November 19, 2008 was served with original process. The Defendants have acknowledged service. See Doc. No. 1.

6. On November 13, 2008, the Defendants filed their Notice of Removal. Doc. No. 1.

7. The State does not dispute that most, if not all, of the Defendants' customers with billing addresses in Tennessee are citizens of the State of Tennessee. The computers and other products the Defendants sell typically sell for between \$1,500 and \$2,000. The maximum the State could obtain for restitution is based on the total amount paid to the Defendants for each consumer plus statutory interest. No consumer with a billing address in Tennessee has an ascertainable loss that even begins to approach \$75,000.

8. At this time, the aggregate known consumer restitution the State seeks in this action is \$2,571,601.80.

9. The State does not dispute that BlueHippo Funding, LLC, is a limited liability company incorporated in Maryland, which does not have a principal place of business in Tennessee. The State does not dispute that BlueHippo Capital, LLC, Nevada, is a Nevada limited liability company, which does not have a principal place of business in Tennessee. The State does not dispute that BlueHippo Capital, LLC, Virginia, is a Virginia limited liability company, which does not have a principal place of business in Tennessee.

LEGAL STANDARD

On a motion to remand, the removing party has the burden of proving that removal was proper and that the federal court has jurisdiction. *Wilson v. Republic Iron and Steel Co.*, 257 U.S. 92, 97 (1921). Generally, ambiguities regarding removal are strictly construed against federal jurisdiction. *Eastman v. Marine Mech. Corp.*, 438 F.3d 544, 549-50 (6th Cir. 2006).

ARGUMENT

The Defendants justify removal of the State's civil law enforcement action based solely diversity jurisdiction and do not assert jurisdiction based on a federal question. As shown below, there is no basis for subject matter jurisdiction over the State's civil law enforcement proceeding.

I. A State is not a citizen for federal diversity of citizenship jurisdiction.

With good reason, the Defendants do not dispute that the State is not a citizen for purposes of diversity jurisdiction. "The principle is well settled that a state may not be considered a citizen to establish diversity jurisdiction." *Hughes-Bechtol, Inc. v. West Virginia Bd. of Regents*, 737 F.2d 540, 543 (6th Cir. 1984); See also, *Postal Telegraph Cable Co. v. Alabama*, 155 U.S. 482, 487 (1894).

II. The State is the real party-in-interest.

In determining whether diversity jurisdiction exists, courts must look beyond the named parties and consider the citizenship of the real parties-in-interest. *Navarro Savings Ass’n. v. Lee*, 446 U.S. 458, 461 (1980). Whether a state is the real party-in-interest for diversity purposes must be determined by looking at the “essential nature and effect of the proceeding.” *Ford Motor Co. v. Dep’t. of Treasury*, 323 U.S. 459, 464 (1945).

The federal courts that have addressed the “essential nature and effect of the proceeding” in the context of removal of an action brought by a state attorney general have fallen into two disproportionate camps. The majority of jurisdictions,¹ including the only two district courts

¹ *Hood ex rel. State of Mississippi v. Microsoft Corp.*, 428 F.Supp.2d 537, 545 (S.D. Miss. 2006) (“[Benefit to private parties] alone, without more, does not require this court to break apart the complaint along those lines for purposes of determining the real party in interest. On the contrary, courts analyze real party in interest questions by examining the State’s interest in a lawsuit as a whole.”) *State of Missouri ex. rel. Webster v. Freedom Fin. Corp.*, 727 F.Supp. 1313, 1317 (W.D. Mo. 1989) (“[t]he interest of the state of Missouri . . . is sufficient to preclude characterizing the State as a nominal party without a real interest in the outcome of this lawsuit” (Emphasis added); *State of Missouri ex. rel. Webster v. Best Buy Co., Inc.*, 715 F. Supp. 1455, 1457 (E.D. Mo. 1989) (granting State’s motion to remand and stating, “Although plaintiff seeks relief for injured citizens, it is obvious that the State’s purpose of seeking widespread relief is not merely to vindicate the interest of a few private parties. Rather, it is to accomplish the purposes of the Act.”); *State of Alabama ex. rel. Galanos v. Star Serv. & Petroleum Co.*, 616 F.Supp. 429, 431 (S.D. Ala. 1985) (“[w]hether other parties will benefit from this action does not affect the state’s valid interest in enforcing this statutory scheme.”); *Wisconsin v. Abbott Laboratories*, 341 F.Supp.2d 1057, 1063 (W.D. Wisc. 2004) (granting remand and stating, “The fact that private parties may benefit monetarily from a favorable resolution of this case does not minimize or negate plaintiff’s substantial interest.”); *New York v. General Motors Corp.*, 547 F.Supp. 703 (S.D.N.Y. 1982) (state is real party in interest and removal improper where state sought to recover damages for defrauded consumers but also had quasi-sovereign interest in securing an honest marketplace and was party who would be bound by the results of the action.); *State of West Virginia v. Morgan Stanley & Co. Inc.*, 747 F.Supp. 332, 339 (S.D. W. Va. 1990) (“The potential existence of other real parties in interest to the controversy does not negate the State’s own real, substantial and dominant interest in the outcome of this litigation nor does it in this instance serve to create diversity jurisdiction.”); See also, *People v. Hunt Resources Corp.*, 481 F.Supp. 71, 73-74 (N.D. Ill. 1979) (rejecting Defendants real party-in-interest argument even though Illinois Attorney General’s action would have resulted in pecuniary benefit to private parties); *State of Louisiana ex. rel. Ieyoub v. Borden, Inc.*, No. 94-3640, 1995 WL 59548, at *2 (E.D. La 1995) (granting State’s motion to remand on action partially involving reimbursement to public school children for milk prices collusively obtained); *State of Maine v. First Jersey Securities, Inc.*, 655 F.Supp. 1370, 1370 (D. Maine 1987) (The State of Maine is a real party-in-interest, having an interest in the litigation separate and distinct from the interests of the individual class members for whose benefit the action is in part brought by the State of Maine).

known to have addressed the issue in the Sixth Circuit,² have looked to the state's complaint as a whole to determine whether a given state is the real party-in-interest. The small minority of jurisdictions, including *State of Louisiana ex rel. Caldwell v. Allstate Insurance Co*, 536 F.3d 418 (5th Cir. 2008), cited by the Defendants, look specifically at each remedy sought by the State to determine whether the State is the real party-in-interest as to that specific relief.³

The Defendants' "nominal plaintiff" argument, which asserts diversity jurisdiction based on one of the State's remedies, namely restitution, was recently rejected by another district court within the Sixth Circuit in an indistinguishable case involving a state attorney general proceeding under consumer protection causes of action. *Commonwealth ex. rel. Stumbo v. Marathon Petroleum Co., LLC*, No. 3:07-cv-00030-KKC, 2007 WL 2900461 (E.D. Ky. Oct. 3, 2007).

In *Marathon Petroleum Co.*, the Court granted the Kentucky Attorney General's remand motion in an action based on Kentucky's Consumer Protection Act and Anti-Price Gouging statute, which, as here, sought a declaration that the Defendants violated the consumer protection statutes, injunctive relief, civil penalties, restitution, and attorneys' fees and costs. The *Marathon Petroleum Co.* court looked to the underlying statutory scheme, which as here provides for the Attorney General to proceed in the name of the sovereign, and the relief sought by the Kentucky Attorney General in his Complaint as a whole, in granting the Commonwealth's motion to remand and finding that the Commonwealth was the real party-in-interest. *Marathon Petroleum Co.*, 2007 WL 2900461, at *4-5.

² *Commonwealth of Kentucky ex. rel. Stumbo v. Marathon Petroleum Co., LLC*, No. 3:07-cv-00030-KKC, 2007 WL 2900461, at *5 (E.D. Ky. 2007) ("Restitution on behalf of particular consumers, this [relief] is only one aspect of the wide ranging relief sought, the substantial portion of which will benefit all Kentucky consumers."); *State v. Citibank, N.A.*, No. 2:07 CV 1149, 2008 WL 1990363, at *3-4 (S.D. Ohio May 1, 2008) (applying "complaint as a whole" standard for real party-in-interest analysis).

³ See e.g., *State of Connecticut v. Levi Strauss & Co.*, 471 F.Supp. 363, 371 (D. Conn. 1979).

The *Marathon Petroleum Co.* court looked to the relief sought and found that the complaint when judged as a whole advanced the state's substantial interest. The Court stated, "The declaration, injunction, and civil penalties will benefit all Kentucky consumers not just a particular set of consumers." *Marathon Petroleum Co.*, 2007 WL 2900461, at *5. The *Marathon Petroleum Co.* court also stated, "While the Attorney General does also seek restitution on behalf of particular consumers, this is only one aspect of the wide-ranging relief sought, the substantial portion of which will benefit all Kentucky consumers." *Marathon Petroleum Co.*, 2007 WL 2900461, at *5.

Though not involving restitution, another district court in the Sixth Circuit recently wholly adopted the "complaint as a whole" analysis in *Marathon Petroleum Co.* in a consumer protection case brought by the Ohio Attorney General. *State v. Citibank, N.A.*, No. 2:07 CV 1149, 2008 WL 1990363, at *3-4 (S.D. Ohio May 1, 2008). An analysis based on *Marathon Petroleum Co.*, *Citibank*, and the majority of other federal court cases addressing the issue yields the same result in this action, namely remand.

A review of the statutory scheme in this action should yield the same result. The TCPA is designed to preserve the integrity of the marketplace. The TCPA was enacted to "protect consumers and legitimate business enterprises from those who engage in unfair or deceptive acts or practices," "to encourage and promote the development of fair consumer practices," and to "[maintain] ethical standards of dealing between persons engaged in business and the consumer public to the end that good faith dealings between buyers and sellers at all levels of commerce be had in this state." Tenn. Code Ann. § 47-18-102(2),(3), and (4).

The United States Supreme Court has recognized that a state has a quasi-sovereign interest in the health and well-being both physical *and economic* of its residents. *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 607 (1982) (Emphasis added). In the context of the First Amendment, the Supreme Court has also noted that “the state has a legitimate and indeed ‘compelling’ interest in preventing those aspects of solicitation that involve fraud, undue influence, intimidation, overreaching, and other forms of ‘vexatious conduct.’” *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 462 (1978). “[S]ome of the most basic of a state’s quasi-sovereign interests include maintenance of the integrity of the markets and exchanges operating within its boundaries, (and) protection of its citizens from fraudulent and deceptive practices.” *Kelley v. Carr*, 442 F.Supp. 346, 356-7 (W.D. Mich. 1977), rev’d in part on other grounds 691 F.2d 800 (6th Cir. 1980).

The State’s action advances the expressed statutory goals, which protect the integrity of the marketplace as a whole. While the State, as the Tennessee Supreme Court noted in passing,⁴ is able to seek restitution for consumers through an action under the TCPA, the State’s position in this case and in all actions it brings is procedurally and functionally distinct from that of a representative in a class action, is focused on its substantial sovereign interests, and is not restricted by any third-party contract defenses that may be asserted against the government in a law enforcement proceeding.⁵

4 *Walker v. Sunrise Pontiac-GMC Truck, Inc.*, 249 S.W.3d 301, 311 (Tenn. 2008).

5 Tenn. Code Ann. § 47-18-113(b) (“[N]o action of a consumer or other person can alter, amend, obstruct, or abolish the right of the attorney general and reporter to protect the state of Tennessee and consumers or other persons within this state or from other states who are victims of illegal practices of persons located, wholly or in part, in Tennessee’s borders.”) See also, *E.E.O.C. v. Waffle House*, 534 U.S. 279, 294 (2002) (unequivocally holding that arbitration clause could not be used to prevent EEOC’s ADA enforcement action which sought victim-specific relief, such as backpay, reinstatement, and damages.) In holding that the EEOC could not be deprived of its statutory authority by an agreement to which it was not a party, the Supreme Court specifically recognized that the government does not stand in the “shoes” of individual victims and its claims against a wrongdoers “are not merely

The Attorney General has explicit authority to file in the name of the State and seek relief, including civil penalties and injunctive relief without a showing of harm that are not available to consumers. In addition, cases under the TCPA are to be advanced in the public, rather than private, interest. Tennessee Code Annotated § 47-18-108(a)(1) states:

Whenever the division has reason to believe that any person has engaged in . . . any practice declared unlawful by this part ***and that the proceedings would be in the public interest***, the attorney general and reporter, at the request of the division, ***may bring an action in the name of the state*** against such person to restrain by temporary restraining order, temporary injunction, or permanent injunction the use of such act or practice.

In other jurisdictions, district courts who conducted similar inquiries have determined that the state was the real party-in-interest because the state statute gave the attorney general the authority to bring suit in the name of the state. *Moore v. Abbott Laboratories, Inc.*, 900 F. Supp. 26, 31 (S.D. Miss. 1995). Similarly, in finding that the Kentucky Attorney General's complaint as a whole showed the Commonwealth to be the real party-in-interest, the *Marathon Petroleum Co.* court explicitly pointed out that the Kentucky Attorney General was specifically authorized under the Kentucky Consumer Protection Act and Anti-Price Gouging statute to bring actions "in the name of" or "on behalf of" the Commonwealth. *Marathon Petroleum Co.*, 2007 WL 2900461, at *5.

The State seeks a sweeping temporary and permanent injunction to prevent the Defendants from continuing to violate the Tennessee Consumer Protection Act including the Prizes Offered as Inducements statute. The injunctive relief does not stand to benefit the finite number of Tennesseans who are already victims. Rather, the injunctive relief seeks to bring the Defendants' commercial practices within the bounds of the law for the benefit of future

derivative" of individual claims. *Waffle House*, 534 U.S. at 297.

consumers and legitimate businesses including the Defendants' competitors who operate lawfully. In addition, though the TCPA is inherently a remedial statute,⁶ the State's action will serve notice on other third-party copycat commercial actors, including Guaranteed Consumer Funding (www.gcf4all.com), whose representations and business model appear very similar to the Defendants.

The State's ability to obtain statutory injunctive relief is tied to the Defendants' violation of the law, not harm. Tenn. Code Ann. § 47-18-108(a)(1). The State has the ability to obtain prohibitions against conduct that violates the TCPA without the necessity of showing of consumer harm that would be required under a private right of action. Unlike private actions, which are rooted in the equity jurisdiction of the courts, in suits based upon statutory authority, proof of irreparable harm or the inadequacy of other remedies is not required. *Sec. and Exch. Comm'n v. Youmans*, 729 F.2d 413, 415 (6th Cir. 1984).

Under the state action provision of the TCPA, the State is authorized to seek civil penalties for each violation. These penalties are able to be assessed without having to show an ascertainable loss. Tenn. Code Ann. § 47-18-108(b)(3). While the gravamen of the State's action is to protect the integrity of the marketplace, the State also is positioned to recover substantial remedial civil penalties based on each violation of the TCPA and the Prizes Offered as Inducements statute found within the TCPA using remedial factors. Under the general civil penalty provision, *the State* is entitled to recover up to \$1,000 per violation of the TCPA. Tenn. Code Ann. § 47-18-108(b)(3). Likewise, under the Prizes Offered as Inducements statute, *the State* is able to recover a civil penalty of a minimum of one thousand dollars to a maximum of ten times the amount collected or requested by the offeror for each violation. Tenn. Code Ann. §

⁶ Tenn. Code Ann. § 47-18-115.

47-18-120(g).

The State also seeks consumer restitution as but one arrow in its quiver of remedies. The fact that private parties may benefit monetarily from a favorable resolution of the case does not minimize nor negate the State's substantial interest in maintaining the integrity of the marketplace and is only one aspect of the wide-ranging relief sought, the substantial portion of which will benefit all Tennessee consumers. *State of New York by Abrams v. General Motors Corp.*, 547 F.Supp. 703, 707 (S.D.N.Y. 1982) ("Recovery of damages for aggrieved consumers is but one aspect of the case. The focus on obtaining wide-ranging injunctive relief designed to vindicate the State's quasi-sovereign interest in securing an honest marketplace for all consumers. That recovery on behalf of an identifiable group is also sought should not require this Court to ignore the primary purpose of the action and to characterize it as one brought solely for the benefit of a few private parties.") At its core, the State alleges that the Defendants have harmed the integrity of the marketplace. Restitution is but one way to remedy this harm committed on the marketplace.

In the Defendants' Notice of Removal, the Defendants principally rely on *State v. Allstate Ins. Co.*, which involved a case brought by the Louisiana Attorney General for treble damages, forfeiture, and injunctive relief. 536 F.3d 418, 423 (5th Cir. 2008) (cited at Doc. No. 1, paras 15-16). The court in *Allstate* followed the minority of holdings and subjected each remedy sought by the State to a "real party-in-interest" analysis. See *Allstate Ins. Co.*, 536 F.3d at 429 ("We conclude that as far as the State's request for treble damages is concerned, the policyholders are the real parties in interest"); See also, *State of Connecticut v. Levi Strauss and Co.*, 471 F.Supp. 363, 371 (D. Conn. 1979).

These minority holdings can be traced to *Missouri, Kansas & Texas Railway Co. v. Hickman*, 183 U.S. 53, 61 (1901). In *Hickman*, a group of railroad commissioners sued to enforce an administrative order in state court and were removed, over the state court's objections, by the railroad companies. *Hickman*, 183 U.S. at 59. "The primary issue in [*Hickman*] was whether the Board of Railroad Commissioners could be considered the alter ego of the State; there was never any question as to whether the Board had a real interest in the controversy." *State of New York by Abrams v. Gen. Motors Corp.*, 547 F.Supp. 703, 706 n. 6 (S.D.N.Y. 1982).

In the course of its opinion, the *Hickman* court stated, "the state is such real party when the relief sought is that which inures to it alone, and in its favor the judgment or decree, if for the plaintiff, will effectively operate." 183 U.S. 53, 59 (1901). Elsewhere, the Court emphasized that if successful, the commissioners would not "recover any money for the state." *Hickman*, 183 U.S. at 59.

The majority of lower courts, including courts within the Sixth Circuit, have either dismissed *Hickman* as inapplicable because it concerns whether an agency was the State's alter ego⁷ or have rejected a strict construction of the language in *Hickman*, and instead have focused

⁷ *State of Missouri v. Best Buy Co., Inc.*, 715 F.Supp. 1455, 1457-58, n. 2 (E.D. Mo. 1989) (granting State's motion to remand and stating "The Defendant also relies heavily on the Supreme Court decision *Missouri, Kansas and Texas Railway Co. v. Hickman* . . . That decision, however, addressed the issue of whether an agency was the State's alter ego.") ("Thus, the issue is not whether the Attorney General is the alter ego of the state, but whether the Attorney General, as the State's alter ego, is the true party in interest."); *State of New York by Abrams v. Gen. Motors Corp.*, 547 F.Supp. 703, 706 n. 6 (S.D.N.Y. 1982) ("GM argues that consideration of this motion should be guided by [*Hickman*], a case in which the Supreme Court held that the State of Missouri was not a real party in interest in a suit by the Missouri Board of Railroad Commissioners to enforce various statutes relating to railroad rates. This Court disagrees. The primary issue in [*Hickman*] was whether the Board of Railroad Commissioners could be considered the alter ego of the State; there was never any question as to whether the Board had a real interest in the controversy.")

on the state's interest, monetary or otherwise, in the context of the entire case.⁸

Here, there is no dispute that the Attorney General and Reporter is the alter ego of the State. Based on a review of the complaint as a whole, it is clear that the State is the real party-in-interest.

III. The Defendants have not met their amount-in-controversy burden.

For the reasons stated above, the State is the real party-in-interest, but even if one were to accept the Defendants' argument to look at each specific remedy the State seeks, there is still no basis for jurisdiction. The Defendants' removal petition is fatally flawed because they cannot simultaneously satisfy both of the jurisdictional requirements, namely, diverse citizenship and a claim in excess of the jurisdictional amount.

The Defendant seeking to remove an action bears the burden of showing satisfaction of the amount in controversy requirement for diversity jurisdiction. *Everett v. Verizon Wireless, Inc.*, 460 F.3d 818, 822 (6th Cir. 2006). As their only support in their Notice of Removal for the

⁸ *Wisconsin v. Abbott Laboratories*, 341 F.Supp.2d 1057, 1063 (W.D. Wisc. 2004) (“[L]ower courts have not strictly construed the language in [*Hickman*], but instead have focused on the state's interest, monetary or otherwise, in the context of the entire case.”); See *Commonwealth of Kentucky ex. rel. Stumbo v. Marathon Petroleum Co., LLC*, No. 3:07-cv-00030-KKC, 2007 WL 2900461, at *5 (E.D. Ky. Oct. 3, 2007) (citing *Abbott* and analyzing real party-in-interest analysis based on complaint as a whole); See *State of Ohio ex. rel. Dann v. Citibank, N.A.*, No. 2:07 CV 1149, 2008 WL 1990363, at *3 (S.D. Ohio May 1, 2008) (also citing *Abbott* and analyzing real party-in-interest analysis based on the complaint as a whole); *State of West Virginia v. Morgan Stanley & Co., Inc.*, 747 F.Supp. 332, 338 (S.D. W. Va. 1990) (“A narrow reading of [*Hickman*] would suggest that the state is the real party in interest for diversity purposes only when the relief sought inures to the benefit of the state alone. However, subsequent cases have not been so limiting. So long as the state is more than a nominal or formal party and has a real interest, pecuniary or otherwise, in the outcome of the litigation, it has been held that the State is a real party to the controversy and removal on diversity grounds is improper); *State of Missouri ex. rel. Webster v. Freedom Fin. Corp.*, 727 F.Supp. 1313, 1317 (W.D. Mo. 1989) (citing *Hickman*, but analyzing real party-in-interest based on complaint as a whole); See also, *State of Alabama ex. rel. Galanos v. Star Serv. & Petroleum Co.*, 616 F.Supp. 429, 431 (S.D. Ala. 1985) (“[w]hether other parties will benefit from this action does not affect the state's valid interest in enforcing this statutory scheme.”); See also, *People v. Hunt Resources Corp.*, 481 F.Supp. 71, 73-74 (N.D. Ill. 1979) (rejecting Defendants real party in interest argument even though Illinois Attorney General's action would have resulted in pecuniary benefit to private parties); *State of Louisiana ex. rel. Ieyoub v. Borden, Inc.*, No. 94-3640, 1995 WL 59548, at *2 (E.D. La 1995) (granting State's motion to remand on action partially involving reimbursement to public school children for milk prices collusively obtained); *State of Maine v. First Jersey Sec. Inc.*, 655 F.Supp. 1370, 1370 (D. Maine 1987).

amount in controversy, the Defendants baldly assert that, “The matter in controversy in this action, exclusive of interest and costs, exceeds the jurisdictional minimum of \$75,000 set forth in 29 [sic] U.S.C. § 1332(a).” Doc. No. 1., at para. 17.

The Defendants also frame the case in the following way, “This case, in substance is a class action brought on behalf of an identifiable class of 4,542 Tennessee consumers and seeks redress on their behalf for alleged violations of the Tennessee Consumer Protection Act.” Doc. No. 1, at para. 16. “In seeking restitution on behalf of 4,542 Tennessee consumers, the State of Tennessee is acting on behalf of those consumers and it is the citizenship of the consumers themselves, who are the real-parties-in-interest, that matters for purposes of federal diversity.” Doc. No. 1, at para. 16. In essence, the Defendants assert that the State’s position as a real party-in-interest should be assessed based on the restitution remedy. The Defendants principally rely on *State of Louisiana ex rel. Caldwell v. Allstate Ins. Co.*, 536 F.3d at 429 (“We conclude that *as far as the State’s request for treble damages is concerned*, the policyholders are the real parties in interest”).

Even assuming for argument’s sake that the real party-in-interest analysis should be applied to each specific remedy and that the State does not have a sovereign interest in restitution, propositions that the State disputes, the Defendants cannot simultaneously satisfy both of the jurisdictional requirements, namely, diverse citizenship and a claim in excess of the jurisdictional amount. See *State of Connecticut v. Levis Strauss and Co.*, 471 F.Supp. 363, 372 (D. Conn. 1979).

Each individual who would be eligible for restitution under the State’s action has a claim of no more than a few thousand dollars for the amount paid or total cost of the computer or other

product. No one consumer has a claim for anything close to the \$75,000 threshold. “While a single plaintiff can aggregate the value of her claims against a defendant to meet the amount-in-controversy requirement, even when those claims share nothing in the common besides the identity of the parties, the same is not true with respect to multiple plaintiffs.” *Everett v. Verizon Wireless, Inc.*, 460 F.3d 818, 822 (6th Cir. 2006) (internal citations omitted). Only when two or more plaintiffs unite to enforce a single title or right in which they have a common and undivided interest may federal courts rely on the aggregate amount of these claims to satisfy the amount in controversy requirement. *Snyder v. Harris*, 394 U.S. 332, 335 (1969). The Sixth Circuit recently reversed a district court’s denial of a remand motion involving a class action finding that the district court never had jurisdiction because the claims of the individual class members, including disgorgement and punitive damages, did not involve claims of a common and undivided interest. *Verizon Wireless, Inc.*, 400 F.3d at 822. The class representative had brought a class action on behalf of all consumers who were allegedly overcharged for unanswered phone calls.

In that case, the Sixth Circuit emphasized that the similarity of consumer claims does not mean that these consumers have a joint interest in enforcing a single title or right. The court stated:

While each plaintiff in this instance asserts a similar claim against his or her telephone carrier that the carrier impermissibly charged for unanswered or busy-signal calls – nothing about the similarity of these claims shows that the plaintiffs hold a joint interest in enforcing a single title or right. Like the seaman’s claims for wages in [*Oliver v. Alexander*, 31 U.S. 143 (1832)], each putative class member’s claim for overcharges may stem from a similarly worded contract but they nonetheless remain legally distinct rights. Each customer had the option, had he or she wished, to sue the provider individually for the amount the provider wrongly charged

– a legal reality that precludes jurisdiction today no less than it did 100 years ago.

Verizon Wireless Co., 460 F.3d at 825.

Where putative class [members] have no joint interest other than a shared appetite for a money judgment payable by a single defendant they do not share the type of common and undivided interest that warrants an exception to the rule against aggregating claims.

Verizon Wireless Co., 460 F.3d at 824.

Similarly, if the State’s restitution claim is to be seen as the Defendants suggest as de facto class action, a proposition the State disputes, the individual consumers’ claims are legally distinct rights and involve no common and undivided interest in the property.

The *Verizon Wireless, Inc.* case was filed prior to the enactment of the Class Action Fairness Act, Pub. L. No. 109-2, 119 Stat. 4, 9 (Feb. 18, 2005), which altered the amount-in-controversy amount for class actions. But we reach the same result under CAFA, because the approximately \$2.5 million in restitution is also well below CAFA’s \$5,000,000 threshold for diversity jurisdiction based on a class action. 28 U.S.C. § 1332(d).

If one accepts the specific remedy approach to the “real party-in-interest,” one is confined to that remedy to satisfy the amount-in-controversy. As the district court noted in *Levi Strauss & Co.*:

However, the claim Connecticut makes for the remainder of overcharges not to be distributed to identifiable purchasers, for civil penalties, and for attorney’s fees is brought in its sovereign capacity. These funds are not sought for any specific individuals or group of individuals. The funds would belong to the state. In seeking them, Connecticut cannot satisfy the citizenship requirement of diversity jurisdiction. Thus, as to no one element of its money claim can Connecticut simultaneously satisfy the citizenship and jurisdictional amount requirements.

State of Connecticut v. Levi Strauss & Co., 471 F.Supp. 363, 372 (D. Conn. 1979). The Defendants cannot have it both ways. The Defendants cannot argue that each remedy the State seeks is subject to party-in-interest analysis and at the same time use the remedies that the Defendants do not assert form a basis for diversity jurisdiction to meet the amount-in-controversy requirement. The Defendants' basis for jurisdiction fails under their own argument.

IV. Justification for Attorneys' Fees Award in Motion to Remand

Attorneys' fees are awarded under 28 U.S.C. § 1447(c) only "where the removing party lacked an objectively reasonable basis for seeking removal." *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 141 (2005). Here, the Defendants have not managed to present an objectively reasonable basis for seeking removal because the Defendants have advanced an argument that, even if followed, does not provide for a basis for diversity jurisdiction. The State is therefore entitled, pursuant to 28 U.S.C. § 1447(c), to reasonable attorneys' fees incurred as a result of the improper removal.

V. Justification for expedited treatment.

The State respectfully requests expedited treatment of its motion to remand, so that a temporary injunction hearing can be had in state court as soon as possible where there is jurisdiction. The State believes that the Defendants continue to violate the law and that expedited treatment would serve the public interest.

CONCLUSION

Based on the above, this court possesses no subject matter jurisdiction. The State's motion for remand should be granted.

Respectfully submitted,

/S/ JEFF HILL

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*Application for admission in W.D. Tenn. Pending

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was filed electronically this 24th day of November, 2008. In addition, pursuant to local rules, Mr. Neenan was sent the cases cited by the State in its Memorandum that do not appear in a standard reporting series. Notice of this filing and the unreported cases will be sent by operation of the Court's electronic filing system to Gerald D. Neenan and the other counsel of record, Neal and Harwell, PLC, 150 Fourth Avenue North, Suite 2000, Nashville, Tennessee 37219.

/S/ JEFF HILL
